Supreme Court, U.S.
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No. 94-2059

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

GARY LEHTO,
Petitioner,
v.
ALLSTATE INSURANCE COMPANY,
Respondent.

Petition For Writ Of Certiorari
To The California Court of Appeal,
For The Second Appellate District, Division Five

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does a state court of appeal violate the federal constitutional right to "jury trial" when it reverses an order denying a motion for judgment notwithstanding the verdict and directs that judgment notwithstanding the verdict be entered on the ground the plaintiff failed to prove a state law claim as a matter of law?

RULE 29.1 STATEMENT

In accordance with Supreme Court Rule 29.1, Allstate Insurance Company hereby states that it has no parent company and no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This California state court action, involving only state law insurance "bad faith" claims, arose out of an automobile accident involving petitioner and the son of one of Allstate's insureds. (Pet. App. A2) Allstate quickly concluded that its insured driver was at fault and tendered its $50,000 policy limits ($25,000 limit per claimant). Because multiple claimants with varying injuries were involved, Allstate filed an interpleader action and deposited the policy limits in state court. (*Id.* at A2-A3) The claimants subsequently reached an agreement as to an equitable distribution of the insurance proceeds, and Allstate accordingly settled with and obtained releases from all the claimants, except petitioner. (*Id.* at A4)

Instead, petitioner demanded that Allstate immediately and unconditionally pay him the per claimant limits without any settlement and release of either of its two insureds (the driver/son and owner/father). (*Id.* at A4) When Allstate refused this demand, petitioner twice asked the state interpleader court to release the insurance proceeds to him. (*Id.* at A3-A4) The state interpleader court refused, explaining to petitioner that under California law he had two choices. He could agree to settle and immediately obtain the per claimant policy limits, or he could refuse to settle and pursue a lawsuit against the insureds, in which case he would obtain the limits if and when he recovered a judgment against the insureds. (*Id.* at A4)

Almost two years after the accident, petitioner made a new demand. He would settle with only one of the insureds, the owner/father, in exchange for payment of the policy limits. (*Id.* at A4) Allstate's insureds opposed this demand, and Allstate rejected it because under California law it could not act to the detriment of one insured, nor could it favor one insured over the other. (*Id.* at A4-A5)

Petitioner then proceeded with his personal injury action against the insureds. On the eve of trial, he settled for a $2.6 million stipulated judgment and an assignment of any "bad faith" rights of the insureds, in exchange for a covenant not to execute. (*Id.* at A6) Petitioner then sued Allstate, claiming it had violated California insurance "bad faith" law by refusing to attempt to settle within policy limits. (*Id.*)

The "bad faith" case proceeded to trial, and the jury returned a $3.5 million verdict. (*Id.* at A6-A7) Allstate moved for judgment notwithstanding the verdict (JNOV) on the ground the evidence did not and could not support a claim of "bad faith" as a matter of law. (*Id.* at A7) When this motion was denied, Allstate appealed to the California Court of Appeal. In an extensive opinion, the Court of

Appeal concluded that under California's insurance "bad faith" law, petitioner had failed to prove any claim of "bad faith" as a matter of law. It therefore ruled that the trial court had erred in denying Allstate's motion for JNOV, and in accordance with California procedural law, directed that the trial court enter JNOV in Allstate's favor on remand. (*Id.* at A21)

Petitioner then filed a petition asking for rehearing by the California Court of Appeal, which was denied. (Pet.App. B1) Petitioner then filed a petition for review by the California Supreme Court. This petition was also denied. (Pet.App. D1)

THIS PETITION IS FRIVOLOUS AND SHOULD BE DENIED BECAUSE THERE IS NO FEDERAL ISSUE PRESENTED BY THIS STATE LAW TORT CASE

Supreme Court Rule 10 specifies that review on writ of certiorari is not a matter of right and that a petition will be granted only when there are special and important reasons to do so. S.Ct.R. 10.1. Rule 10 further states that such reasons include where there is a conflict on a federal question in the United States court of appeals, where there is a conflict on a federal question between a state court of last resort and an United States court of appeals, and where a state court or United States court of appeals has decided an important question of federal law that should be decided by this Court. *Id.*

The crux of petitioner's purported constitutional claims here is that the California Court of Appeal violated his "right to jury trial" when it ruled that the evidence he presented at trial failed to establish an insurance "bad faith" claim under California law and that the trial court erred in denying Allstate's motion for JNOV. In short, petitioner claims a jury's verdict is sacrosanct and that appellate courts

are constitutionally prohibited from overturning a jury's verdict even when that verdict is based on erroneous and improper legal rulings and is unsustainable under the controlling substantive law. This claim is specious and does not conceivably meet the standard set forth in Rule 10.1 for review on writ of certiorari.

Indeed, there is no substantive difference between the California JNOV statutes [Cal. Civ. Proc. Code § 629 (*see* App. A)] and its federal counterpart in Fed.R.Civ.P. Rule 50(b). In fact, petitioner makes no attack on the standards set forth in the California statute or any alleged failure by the Court of Appeal to correctly apply them. Rather, he makes the now antiquated claim that *any* use of JNOV violates his federal right to jury trial because such a procedural device did not exist in the common law. Yet, the federal courts have not doubted the constitutionality of JNOVs since the enactment of Fed.R.Civ.P. 50(b) in 1937. *See, e.g., Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Berry v. United States*, 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945 (1941); *Nelson v. Production Credit Ass'n of the Midlands*, 930 F.2d 599, 604, fn. 6 (8th Cir.), *cert. denied*, 112 S.Ct. 417, 116 L.Ed.2d 438 (1991) ("The Supreme Court has long held that the question of whether there is sufficient evidence to support submission of an issue to the jury is a legal determination, and that entry of judgment notwithstanding the verdict under Fed.R.Civ.P. 50(b) does not contravene the Seventh Amendment.")

In fact, the federal courts routinely overturn jury verdicts and, as did the California Court of Appeal, direct entry of judgment as a matter of law on claims which are unsupported by sufficient legal evidence. *E.g., McCann v. Litton Sys., Inc.*, 986 F.2d 946 (5th Cir. 1993); *Romero v. Int'l Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441 (11th Cir. 1991);

Newton v. Nat'l Broadcasting Co., 930 F.2d 662 (9th Cir.), *cert. denied*, 112 S.Ct. 192, 116 L.Ed.2d 152 (1991).

Plaintiff's reliance on *Slocum v. New York Life Insurance Company*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1913), is wholly misplaced. *Slocum* concerned the application of a state JNOV statute in federal district court. Moreover, the Court later upheld the constitutionality of state JNOV practices in similar contexts. *Northern Railway v. Page*, 274 U.S. 65, 47 S.Ct. 491, 74 L.Ed. 929 (1927); *Baltimore & Carolina v. Redman*, 295 U.S. 654, 55 S.Ct. 890, 71 L.Ed. 929 (1935).[1]

Indeed, if petitioner's theory were correct — that where there has been a jury demand, a jury must decide the case and its decision is immutable and irreversible — then *all* judgments as a matter of law, which include summary judgments, nonsuits, and directed verdicts, as well as JNOVs, are unconstitutional. This, of course, is not the case. *E.g., Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1569 fn. 2 (9th Cir. 1992).

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[1] Furthermore, the Seventh Amendment right to jury trial, which is the principal constitutional provision petitioner seeks to invoke, addresses the exercise of federal judicial power in common law actions. The amendment therefore applies only to federal courts, and the state courts are not bound by it. *Minneapolis & St. v. L.R.R. v. Bombolis*, 241 U.S. 211, 217, 36 S.Ct. 595, 60 L.Ed. 961, 963 (1915); *Pearson v. Yewdall*, 95 U.S. 294, 296, 5 Otto 289, 24 L.Ed. 436, 437 (1877); *Walker v. Sauvinet*, 92 U.S. 90, 92, 2 Otto 90, 23 L.Ed. 678, 679 (1875); *Matter of Jacobs*, 44 F.3d 84, 89 (2d Cir. 1994).

CONCLUSION

Petitioner's potpourri of arguments boil down to one claim: that JNOVs violate the Seventh Amendment right to a civil jury trial. The federal courts long ago rejected this claim, and the California Court of Appeal's use of JNOV is in harmony with the federal practice. Therefore, this case presents no question of federal law, and the petition should be denied.

Respectfully submitted,

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APPENDIX A

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 629. Judgment Notwithstanding The Verdict

The court, before the expiration of its power to rule on a motion for a new trial, either of its own motion after five days' notice, or on motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made.

A motion for judgment notwithstanding the verdict shall be made within the period specified by Section 659 of this code in respect of the filing and serving of notice of intention to move for a new trial. The making of a motion for judgment notwithstanding the verdict shall not extend the time within which a party may file and serve notice of intention to move for a new trial. The court shall not rule upon the motion for judgment notwithstanding the verdict until the expiration of the time within which a motion for a new trial must be served and filed, and if a motion for a new trial has been filed with the court by the aggrieved party, the court shall rule upon both motions at the same time. The power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial. If a motion for judgment notwithstanding the verdict is not determined before such date, the effect shall be a denial of such motion without further order of the court.

If the motion for judgment notwithstanding the verdict be denied and if a new trial be denied, the appellate court shall, when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal from the judgment or from the order

denying the motion for judgment notwithstanding the verdict.

Where a new trial is granted to the party moving for judgment notwithstanding the verdict, and the motion for judgment notwithstanding the verdict is denied, the order denying the motion for judgment notwithstanding the verdict shall nevertheless be reviewable on appeal from said order by the aggrieved party. If the court grants the motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed.